

IN THE UNITED STATES DISTRICT  
COURT FOR THE NORTHERN DISTRICT  
OF TEXAS DALLAS DIVISION

MARIA ROGERS, INDIVIDUALLY	§	
AND an/ of D.R. AND AS REPRESENTATIVE	§	
OF LINDA MICHELLE ROGERS, DECEASED,	§	
JOSE FISCAL AND AMPARO CAMACHO,	§	CASE NO. 3:18-cv-0869-M
Plaintiffs,	§	
	§	
v.	§	
	§	
ATMOS ENERGY CORPORATION,	§	MOTION FOR REMAND BRIEF
Defendant.	§	

**PLAINTIFFS' AND INTERVENORS' MOTION TO REMAND**

COMES NOW Plaintiffs' and Intervenor and file this Motion to Remand and for costs and expenses in connection therewith as follows:

1. Plaintiffs are Maria Rogers, Individually and a/n/f of D.R. and as Representative of Linda Michelle Rogers, deceased, Jose Fiscal, and Amparo Camacho.
2. Intervenor are Clifton Rogers, Andreas Portillo, and Griselda Portillo, Individually and as next friend of her minor children, A.P. and A.P.
3. Defendant Atmos Energy Corporation has received notice of the suit.
4. Defendant filed its notice of removal on April 9, 2018.
5. Under 28 U.S.C. § 1447(c), if it appears that the court lacks subject matter jurisdiction, the court shall remand the case.
6. The claims set forth in the Plaintiffs' and Intervenor (collectively "Plaintiffs") state Petitions for damages arise under state law and present no substantial federal question for purposes of establishing federal jurisdiction under 28 U.S.C. § 1331.
7. Defendant Atmos, as the removing party who bears the burden of establishing federal jurisdiction, has failed to demonstrate applicability of the elements necessary for jurisdiction based

upon a substantial federal question.

3. Atmos cannot prove the four conjunctive elements necessary for federal question jurisdiction to attach:

- (1) A federal right is an essential element of the state claims;
- (2) Interpretation of the federal right is necessary to resolve the case;
- (3) The question of federal law is substantial; and
- (4) Resolution of the claim in federal court will not disrupt the federal-state balance approved by Congress.<sup>1</sup>

4. The pleaded facts contain state law claims sounding in common law negligence and Texas' statutory causes of action. The regulations cited by Atmos as *federal* regulations are in truth, as reflected on page 5 of the Plaintiffs' Petition, *State of Texas* regulations whereby Texas adopted 49 C.F.R. Part 192 as its own. These regulations merely implicate state law negligence *per se* claims, not a federal question.

5. Northern District of Texas, Dallas Division precedent instructs that Atmos' removal is not proper because negligence *per se* claims in a state case, based upon failure to comply with applicable 49 C.F.R. part 192 regulation is not a substantial federal issue. Proper analysis reveals that exercising federal jurisdiction over every state tort law claim that involved a federal regulation standard of care would inundate the federal courts with state tort law cases.<sup>2</sup> Quoting from the Restatement (Third) of Torts, the Supreme Court and the *Delgado* court recognized that "[t]he violation of federal statutes and regulations is commonly given negligence *per se* effect in state court proceedings." *Id.* at \*\*8-9 (citing *Grable*, 545 U.S. at 318-19 (quoting *Restatement (Third) of Torts* § 14, Reporter's Note, Comment a, p. 195 (Tent. Draft No. 1, March 28, 2001))).

---

<sup>1</sup> *Franchise Tax Board v. Constr. Laborers Vacation Trust for S. Cal.*, 463 U.S. 1 (1983); *Grable & Sons Metal Products, Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 314 (2005).

<sup>2</sup> *Id.* at 9.

6. Atmos' reliance upon *Bd. Of Commissioners of Se. La. Flood Protection Authority-East v. Tenn. Gas Pipeline Co.*, 850 F.3d 714, 723 (5<sup>th</sup> Cir. 2017) is misplaced because state legal precedent conclusively determined that the defendants in that case had no duty for the alleged claims under state law.

7. Atmos' claim that Plaintiffs' Petition "exclusively" relies on federal regulation is an objectively unreasonable basis for removal. It is factually incorrect. The Court should award Plaintiffs their costs, expenses, and attorneys' fees incurred as a result of Atmos' improper removal.

8. In support of this Motion, Plaintiffs rely upon their Memorandum filed contemporaneously with this Motion.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs respectfully move for this Court to enter its Order remanding this action to County Court at Law in Dallas County, Texas from where it was removed, find that the removal was objectively unreasonable and grant leave to bring to the court evidence of costs, expenses and attorneys' fees incurred in connection with the removal and remand of this case.

Respectfully submitted,

**TED B. LYON & ASSOCIATES, P.C.**

By: /s/ Marquette Wolf  
**MARQUETTE WOLF**  
State Bar No. 00797685  
[mwolf@tedlyon.com](mailto:mwolf@tedlyon.com)  
**TED B. LYON**  
State Bar No. 12741500  
[tblyon@tedlyon.com](mailto:tblyon@tedlyon.com)  
**RICHARD MANN**  
State Bar No. 24079640  
[rmann@tedlyon.com](mailto:rmann@tedlyon.com)  
18601 LBJ Freeway, Suite 525  
Mesquite, Texas 75150

Phone (972) 279-6571

Fax (972) 279-3021

**COUNSEL FOR PLAINTIFFS**

**SCOTT H. PALMER, P.C.**

By: *Is/ Scott H. Palmer*  
**SCOTT H. PALMER**  
State Bar No. 00797196  
15455 Dallas Parkway, Suite 540  
Addison, Texas 75001  
Telephone: 214.987.4100  
Facsimile: 214.922.9900  
scott@scottpalmerlaw.com

**LAW OFFICES OF SEAN R. COX**

By: *Is/Sean R. Cox*  
**SEAN R. COX**  
State Bar No. 24031980  
Law Offices of Sean R. Cox  
P.O. Box 130864  
Dallas, TX 75313  
Telephone: (214) 500-9280  
Facsimile: (844) 501-8688  
scox@coxappellate.com

**LAW OFFICE OF PETE ROWE, P.C.**

By: Isl Pete Rowe  
**PETE ROWE**  
State Bar No. 24072314  
Law Office of Pete Rowe, P.C.  
P.O. Box 703256  
Dallas, TX 75370  
Phone: (817) 637-3830  
Phone: (469) 554-6638  
Facsimile: (972) 346-6783  
[pete.rowe.tx@gmail.com](mailto:pete.rowe.tx@gmail.com)

**ATTORNEYS FOR INTERVENOR  
CLIFTON ROGERS**

**BURT BARR & ASSOCIATES, L.L.P.**

By: /s/ M. Forest Nelson  
John Holman Barr  
State Bar No. 01798700  
M. Forest Nelson  
State Bar No. 14904625  
Mary Christian Barr  
State Bar No. 24082586  
P.O. Box 223667  
Dallas, Texas 75222-3667  
Telephone No. (214) 943-0012  
Facsimile No. (214) 943-0048  
[jbarr@bbarr.com](mailto:jbarr@bbarr.com)  
[fnelson@bbarr.com](mailto:fnelson@bbarr.com)  
[mcbarr@bbarr.com](mailto:mcbarr@bbarr.com)

**ATTORNEYS FOR INTERVENORS  
ANDREAS AND GRISELDA  
PORTILLO**

**CERTIFICATE OF CONFERENCE**

I certify that on Wednesday April 11, 2018, on behalf of all Plaintiffs and Intervenors, Marquette Wolf conferred with counsel for Atmos Energy Corporation, Rod Phelan, concerning the Motion for Remand. Further conference, under Local Rule 7.1, may result in an agreement but as of the filing of this Motion, no agreement could be reached.

/s/ Marquette Wolf  
MARQUETTE WOLF

**CERTIFICATE OF SERVICE**

On April 17, 2018, I electronically filed the foregoing document with the clerk for the Northern District of Texas, using the court's electronic case filing system. I hereby certify that I have served all counsel and *pro se* parties of record electronically on the or by another manner authorized by Federal Rule of Civil Procedure 5(b)(2).

/s/ M. Forest Nelson  
M. FOREST NELSON